

TuckervHealthsouth11-10-04.txt

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1 IN THE CIRCUIT COURT FOR
2 JEFFERSON COUNTY, ALABAMA
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4 CIVIL ACTION NUMBER:
5 CV-02-5212
6
7 WADE TUCKER, et al.,
8 Plaintiff(s),
9 vs.
10 HEALTHSOUTH CORPORATION, et al.,
11 Defendant(s).

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13 TRANSCRIPT OF PROCEEDINGS
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16 DATE: November 10, 2004
17 TIME: 1:45 p.m.
18 PLACE: Birmingham, Alabama
19 BEFORE: Hon. Allwin E. Horn, III
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21
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23 REPORTED BY: Stephanie Burton
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1 A P P E A R A N C E S
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1 A P P E A R A N C E S

2 (Cont'd)

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1 P R O C E E D I N G S

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3 THE COURT: I think we have all the
4 interested parties present now with regard to the
5 hearing of the motions to dismiss of two of the
6 defendants, Ernst & Young and UBS. I have
7 previously ruled that the claims against
8 Ernst & Young will go to arbitration, and I have
9 ruled that the proper plaintiffs are the proper
10 plaintiffs to prosecute the case. And I have

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11 denied HealthSouth's motion to intervene, to file
12 an amended complaint and to take over and
13 prosecute the claim against E&Y. Have I not done
14 all that?

15 MR. SIMPSON: You did all that with
16 the exception of you cannot -- if it's
17 arbitrable, you can rule them versus HealthSouth,
18 you cannot decide who is to sit on anything the
19 plaintiffs vis-à-vis Ernst & Young.

20 THE COURT: I'm not quite
21 understanding, Henry.

22 MR. SIMPSON: Okay. If a matter is
23 arbitrable and under Alabama law, this Court can
24 decide, is there an arbitration contract.

25 THE COURT: Correct.

5

1 MR. SIMPSON: And does it affect
2 interstate commerce. That ends your inquiry,
3 your jurisdiction.

4 THE COURT: Don't I have to decide who
5 has the right to prosecute the claim?

6 MR. SIMPSON: Well, you did decide
7 that with them, vis-à-vis HealthSouth.

8 THE COURT: Correct.

9 MR. SIMPSON: There were two competing
10 orders to compel arbitration, but all you can do
11 now is compel arbitration. You can't decide --
12 For instance, you can't decide the claims are
13 barred by the statute of limitations or half of
14 them are barred. You can't decide anything.

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15 That's just the law. And as I've told my friend
16 John Somerville, I don't think that's going to be
17 a big issue at arbitration. But if the Court
18 were to overstep its authority, then, of course,
19 you have a question of mandamus, et cetera. So
20 you just send it to arbitration. Actually, it
21 has to go to mediation first. That doesn't
22 involve Your Honor. That's just a contract
23 between the parties.

24 MR. DIPRIMA: Your Honor, that's
25 exactly the opposite of the position E&Y has

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1 taken for about a year and a half in this case.
2 Ernst & Young has not only participated in Your
3 Honor's ruling on demand and on control of the
4 case, but indeed it urged Your Honor to rule on
5 these things, and Your Honor did indeed rule on
6 them. So I assume there's going to be -- that's
7 one of the things we're going to be arguing about
8 today.

9 But I did want to -- Let me just quote
10 from Mr. Starnes' -- excuse me -- Mr. Simpson's
11 brief of July 16 on the demand and suppression
12 issues both. "Thus as a threshold matter
13 concerning the arbitrability issue, this Court
14 must decide whether it is appropriate to allow
15 Mr. Tucker to proceed with the claims against
16 E&Y."

17 THE COURT: I have done that.

18 MR. SIMPSON: Then that's all you can
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19 decide. And from the -- what I asked for is that
20 you grant Ernst & Young's motion to compel
21 arbitration, either denominating HealthSouth as a
22 proper party, which you didn't do, or
23 specifically reserving to the arbitration panel
24 the issue of standing, which Alabama law says you
25 have to. For instance, as I said in my letter --

7

1 THE COURT: Maybe I'm not
2 understanding the context in which you're using
3 the word "standing."

4 MR. SIMPSON: What they're trying to
5 get you to do is to say -- so they can say to the
6 arbitrators everything's been decided. Tucker is
7 the appropriate person. Suppose in discovery I
8 determine Tucker is not even a stockholder.
9 Then, obviously, you didn't mean to preclude me
10 from that. All you have decided is that Tucker
11 can proceed without HealthSouth. That's what you
12 have decided.

13 MR. HALEY: It's HealthSouth
14 proceeding, not Tucker. It's HealthSouth.

15 MR. SIMPSON: But you said that these
16 guys can be the lawyers and not --

17 THE COURT: Not HealthSouth.

18 MR. SIMPSON: Not HealthSouth. That's
19 all you can decide.

20 THE COURT: Well, is there some issue
21 as to whether Tucker, in fact, was and is a
22 stockholder?

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23 MR. SOMERVILLE: No, sir.

24 MR. SIMPSON: I have no idea, because
25 there's been no discovery.

8

1 MR. DIPRIMA: Your Honor, that's the
2 first time I've ever heard that issue in this
3 case.

4 MR. SIMPSON: well, it's not proper to
5 raise it here. That's what I'm saying. That's
6 the import of the two cases which I have cited.
7 One of them says specifically the issue of
8 standing is for the arbitrators.

9 THE COURT: You are raising the issue
10 of standing in the context of whether Tucker is a
11 stockholder, not whether he is the proper party
12 to pursue the claim.

13 MR. SIMPSON: Suppose I found out in
14 discovery that he has a criminal record or that
15 his lawyers have been disbarred or something like
16 that. Then, yes, that's something I can raise.
17 And I don't think that's going to come up, Judge.
18 I've known John Somerville. He's been in jail,
19 but I don't think it was for a felony. I don't
20 think it's going to come up, but all I'm saying
21 is that's for the arbitrator.

22 MR. SOMERVILLE: Henry, that was my
23 brother that you're talking about.

24 Judge, here is the brief that he filed
25 in July. And I have marked -- this is my

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1 notes -- but I've marked the place where he asked
2 this Court to decide the threshold issue of
3 Tucker and whether Tucker can proceed with those
4 claims.

5 MR. SIMPSON: Tucker or HealthSouth.

6 MR. DIPRIMA: Your Honor, it's much
7 more extensive than that. May I briefly state
8 the chronology of this whole thing, because what
9 Ernst & Young has done is willingly participate
10 in this motion for 15 or 18 months. They lost
11 and now they're looking for another forum. The
12 one thing -- one of the many things that's
13 characterized in this case as unique -- and I've
14 been at this for eleven decades now --

15 THE COURT: Here's where I'm --

16 MR. STARNES: Unless you're a hundred
17 years old.

18 THE COURT: -- sort of up in the air.
19 There's no evidence before me, nothing has been
20 presented that invalidates Tucker being a proper
21 party to pursue the --

22 MR. SIMPSON: Because it's not an
23 issue before you. You have said that Tucker may
24 proceed vis-à-vis HealthSouth.

25 THE COURT: Correct.

10

1 MR. SIMPSON: As John Haley says.
2 That's all you can decide. You can't say that

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3 Tucker is an appropriate party. That's for the
4 arbitrators.

5 MR. DIPRIMA: That's not true, Your
6 Honor. In every derivative case, the Court
7 decides the issue of standing. The Court decides
8 the issues of the proper party to pursue a case.
9 The Court decides whether the counsel for the
10 derivative plaintiff is adequate to pursue it.
11 The point is --

12 MR. SIMPSON: But he's cited you no
13 case that says that.

14 MR. DIPRIMA: Please, sir, you'll get
15 your chance.

16 The point is this Court did decide it,
17 and E&Y sat by, participated, filed briefs on
18 these very issues, and the Court did decide.
19 It's not a question -- if Mr. Simpson had come
20 along in March of last year when we first filed
21 the Second Amended Complaint and said, look, Your
22 Honor, all these issues including demand, Rule
23 23.1, appropriate party to prosecute the case,
24 all these issues should be decided by the
25 arbitrator, then Your Honor might or might not

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1 have a substantial issue before him. But the
2 point is that E&Y let you decide them, encouraged
3 you to decide them. They participated in that
4 process, and Your Honor did decide them.

5 As far back as May of '03, two months
6 after we filed the Second Amended Complaint, they

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7 filed a motion to dismiss. They stated in the
8 motion to dismiss at page 5, paragraph 17 that we
9 have, "failed to comply with Rule 23.1 of the
10 Alabama Rules of Civil Procedure by failing to
11 make a demand." All right. Then some time went
12 by. We engaged in various motion practice.
13 There was heavy briefing on the demand issue
14 beginning in March. In March, the plaintiffs
15 wrote a motion to expedite the demand issue.
16 Ernst & Young didn't even file a response to that
17 motion. Your Honor essentially granted that
18 motion by your May 10th order, which required
19 briefing on the demand issue. So then we filed
20 another brief on the substance of the demand
21 issue. Ernst & Young filed a letter with Your
22 Honor, promising to provide a brief by July 16th,
23 because that was the day for briefing on the
24 issue of substitution. All right. So that went
25 by. They did file a brief. What did that brief

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1 say? The brief said, as John Somerville pointed
2 out, that the Court must decide if Tucker is the
3 proper party. It encouraged the Court to decide
4 the demands issue. It encouraged the Court to
5 decide the suppression issue. We must know, said
6 Ernst & Young, who the party against us was.

7 Then, at the end of that, the morning
8 session on July 16th, extensive oral arguments
9 three hours in length, Ernst and Young got up
10 through Mr. Simpson and said, you know, we'd like

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11 another chance to argue about that. Your Honor's
12 order of July 29th said, okay, I decide demand
13 against -- in favor of the plaintiff. Demand is
14 excused as to all parties including Ernst & Young
15 and UBS. Demand is excused as to --

16 THE COURT: I didn't --

17 MR. DIPRIMA: Yes, you did, Your
18 Honor.

19 THE COURT: -- by order decide against
20 E&Y and UBS. I reserved their right to brief
21 that issue.

22 MR. DIPRIMA: Yes, sir, Your Honor.
23 But if I may, the order stated that they may
24 brief it in the nature of reargument with
25 non-redundant information and that they must do

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1 so in connection to the motions -- in connection
2 with the schedules on the motions to dismiss.
3 Guess what? Those schedules have come and gone
4 and we're here to argue the motions to dismiss.
5 So the order of the 29th which applied to all
6 defendants, all claims and, incidentally, found
7 that ten of the Directors who were by far the
8 majority of the board on every relevant day, were
9 either independence impaired or not
10 disinterested.

11 THE COURT: Let me try to shortcut
12 this. I don't consider, based upon my litany of
13 reasoning that I cited in the July 24 hearing --
14 was that when it was?

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15 MR. DIPRIMA: 26th, sir.

16 THE COURT: Whatever it was -- that
17 demand futility excusal, or whatever you want to
18 call it, is really the issue.

19 MR. SIMPSON: It's --

20 THE COURT: In my mind it's not an
21 issue. Maybe it is in y'all's minds.

22 MR. SIMPSON: Judge, I would think
23 you'd probably grant my motion to dismiss on the
24 statute of limitations, but you don't reach that.
25 That's my point.

14

1 THE COURT: Do either one of you
2 intend to argue the issue of demand?

3 MR. STARNES: I do, because you
4 expressly accepted that as to UBS at the hearing.

5 THE COURT: I'm saying --

6 MR. STARNES: You said you weren't
7 going to consider that issue as to UBS in July.
8 We didn't argue it. We put it forward to today.
9 And indeed, you couldn't have considered it at
10 that time because you considered nothing about
11 UBS. As to certain defendants, you have
12 considered that issue. But it is a separate
13 determination as to UBS to be decided without
14 regard as to any other defendant.

15 MR. SIMPSON: And if the Court -- I
16 mean, my motion to dismiss was a motion to compel
17 arbitration or, in the alternative, to dismiss.
18 I mean, there's no -- and I have not -- in that

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19 three-hour hearing, I didn't open my mouth
20 because it was not an issue until you reached the
21 issue of arbitrability. At that time,
22 HealthSouth maintained they had the right to come
23 in. In fact, they also contested in one pleading
24 the arbitrability issue at least on part of the
25 years. Now, that's gone away. You ruled that

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1 Tucker could proceed to arbitration. Then all
2 you should and, respectfully, can do is to grant
3 the motion compelling arbitration. You know,
4 they can cite your ruling. They can cite the
5 same evidence if that becomes an issue at
6 arbitration. I don't know whether it's going to
7 become an issue at arbitration. They haven't
8 filed a complaint.

9 THE COURT: All right. Let's do it
10 this way. Let's first entertain the argument
11 about demand futility, demand excusal from
12 Ernst & Young and UBS, and the plaintiff's will
13 respond. Then we will go into the issue of the
14 contracts selection clause. You have already
15 submitted proposed orders with regard to
16 arbitration, and the plaintiffs have submitted a
17 proposed order. Now then, I'll ask if any one of
18 you want to submit an additional proposed order.
19 If not, then I'll make a decision about that.

20 All right. With that, who wants to go
21 first? Mr. Starnes.

22 MR. SIMPSON: Let me -- I've already

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23 made my argument. This is an issue for the
24 arbitrator.

25 THE COURT: Okay.

16

1 MR. STARNES: Your Honor, on behalf of
2 UBS, there are a number of elements of the motion
3 to dismiss filed by UBS to be argued today. But
4 for the moment, I'll confine --

5 THE COURT: I've read your letters and
6 your brief.

7 MR. STARNES: I'll confine my initial
8 remarks to the demand futility issue and consider
9 the other aspects of the motion to dismiss later
10 in the hearing. With respect to demand futility,
11 there's one date and one date of the utmost
12 significance to Your Honor. That date is August
13 8, 2003. It was on that date that UBS was first
14 added as a defendant in this case. And it is as
15 of that date, August 8, 2003, that Your Honor
16 must decide whether the plaintiffs have complied
17 with Rule 23.1 of the Alabama Rules of Civil
18 Procedure in instituting this action on that date
19 against UBS without making demands on
20 HealthSouth. Now, that's a question you have
21 never answered as to any other defendant in this
22 case because, as to all the other defendants, you
23 were dealing with an earlier date in time. But
24 as to UBS, the date is August 8, 2003, a date
25 that is vastly different in many respects than

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1 the date you had under consideration with respect
2 to the other defendants.

3 Alabama Rule of Civil Procedure 23.1
4 requires that, as to UBS, the plaintiffs make the
5 particularized pleading as to why demand was not
6 made. The language of the rule says the
7 complaint shall also allege with particularity
8 the efforts, if any, made by the plaintiff to
9 obtain the action the plaintiff desires from the
10 Directors or comparable authority and, if
11 necessary, from the shareholders or members and
12 the reason for the plaintiff's failure to obtain
13 the action or for not making the effort. Now
14 where in this complaint as to UBS on August 8,
15 2003 is there a particularized statement as to
16 why that effort was not made? There is not one
17 anywhere in the complaint, and demand was not
18 excused of that date. And, in fact, if you go
19 further, you'll see that demand would not have
20 been futile, and there's ample evidence of that.

21 First of all, the plaintiff relies and
22 says, well, HealthSouth has taken a position of
23 neutrality with respect to demand. But if you
24 look at the position HealthSouth has taken,
25 unlike the cases the plaintiff cites to you,

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1 HealthSouth says it was neutral as of the date
2 this case was initiated, long before August 8,
3 2003. Yet we know as a matter of fact in this

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4 case and as a matter of record in this case that
5 HealthSouth has specifically stated that it is
6 prepared to pursue the action against UBS and was
7 as of that date, because much happened between
8 the time of the initiation of the first complaint
9 in this case that did not involve UBS and August
10 8, 2003, which changed the structure of
11 HealthSouth and the decision-making process of
12 HealthSouth. And while the demand might have
13 been futile as to the other defendants when the
14 complaint was initiated against them, that is no
15 basis for concluding that demand would have been
16 futile at the time this case was instituted
17 against UBS on August 8, 2003.

18 Indeed, since April of 2003, a number
19 of months before the filing of this complaint
20 against UBS, decision making at HealthSouth was
21 done by the Special Committee of which Mr.
22 Scrushy was not a member, did not participate and
23 could not have influenced the claims. HealthSouth
24 in the pleadings and on the record before this
25 Court -- and there is nothing in the complaint to

19

1 refute this -- HealthSouth says it has a
2 disinterested, independent Board capable of
3 making these decisions. That is the state of the
4 record in this case, and there is nothing in the
5 complaint of the plaintiff to contradict that.
6 And indeed, the plaintiff HealthSouth has offered
7 to the Court to pursue the very claims that are

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8 at issue here. So where, given that context, is
9 this particularized pleading as why on August 8,
10 2003, demand would have been futile? It does not
11 exist.

12 The plaintiff seeks to lump all the
13 defendants together, those in the original
14 complaint and those added by amendment years
15 later, and say we have shown you demand will be
16 futile. That's not what Rule 23.1 requires.
17 That's not what the law of Alabama requires.
18 That's not what the law of Delaware requires.
19 You have to distinguish between each transaction
20 and a necessity between each defendant. When you
21 do that, you come to different decisions
22 altogether.

23 THE COURT: Without going back and
24 looking through my notes, it's my recollection
25 that when the complaint adding UBS was filed,

20

1 there were eleven members of the board, seven of
2 whom were defendants in the case and two of those
3 seven hadn't even been found impaired as a matter
4 of law by Judge Strine. That was the Board
5 makeup, as my recollection.

6 MR. STARNES: I don't recall that
7 Strine made a specific finding they were impaired
8 as to UBS. He may have made a finding that they
9 were impaired as to HealthSouth commencing an
10 action against Officers and Directors.

11 THE COURT: When was the date of
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12 Strine's decision in the Biondi case?

13 MR. DIPRIMA: January 16th, 2003.

14 THE COURT: All right.

15 MR. STARNES: UBS wasn't even a
16 defendant in that case at that time.

17 THE COURT: Do what, now?

18 MR. STARNES: UBS was not a defendant
19 in the Biondi case, and he couldn't have made a
20 decision as to UBS.

21 THE COURT: When did HealthSouth file
22 its answer? In May of 2004; is that correct?
23 May the 28th?

24 MR. DIPRIMA: Yes, Your Honor.

25 THE COURT: Go ahead, Stan.

21

1 MR. STARNES: August 2003 is when UBS
2 was added. All of this illustrates the
3 extraordinary importance of distinguishing very
4 carefully among transactions because you reach
5 entirely different results. HealthSouth has
6 said -- and there's nothing in the record to
7 contradict this.

8 THE COURT: Would the manner in which
9 all of these claims, transactions, occurrences
10 are alleged to be intertwined with each other, if
11 two had been found to have been impaired as a
12 matter of law at one time, how did they relieve
13 themselves of that status a year down the road?

14 MR. STARNES: First of all, there's
15 never been any finding by any judge that they

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16 were impaired as to making the decision as to
17 whether HealthSouth should prosecute a claim
18 against UBS. That's the decision before Your
19 Honor this morning. There could well be some
20 sort of impairment or reticence on the part of
21 the Director to prosecute a claim against the
22 officers of the company or the Directors of the
23 company, but you can't conclude or presume that
24 the impairment carries over as to a third party
25 such as UBS. So there's never been any

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1 determination that would be applicable to UBS in
2 that regard.

3 THE COURT: How do you get around the
4 May 28 answer?

5 MR. STARNES: Because the May 28 --
6 about the neutrality?

7 THE COURT: Yes.

8 MR. STARNES: Because that says at the
9 time the case was initiated, long before UBS was
10 added, their demand futility issue at that point
11 in time. But HealthSouth in that same record
12 says that there was an independent Board.

13 THE COURT: At the time the answer was
14 filed, the complaint had been amended through the
15 Fourth amendment, and there have been no
16 subsequent amendments.

17 MR. STARNES: But if you look at what
18 they say in that answer, HealthSouth says in that
19 answer that the neutrality position they express

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20 is applied to the excusal of demand "prior to the
21 initiation of this action." So they are taking a
22 neutral position as to whether the demand would
23 have been futile back all those years ago. But
24 they also say that all of the decisions made
25 subsequent to April 2003 by the Special Committee

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1 were being made by a disinterested and
2 independent body as to which Scrushy and nobody
3 else had any cause. That's all months before UBS
4 was added in this case. The fact you and I are
5 having this discussion illustrates that there is
6 no particularized pleading before Your Honor
7 excusing demand as to UBS. There ought to be a
8 place in this complaint where you can go and
9 where the plaintiff says to you that, as of the
10 date UBS was added, August 8, 2003, demand would
11 have been futile because of these particularized
12 reasons. Particularized as to UBS, not as to
13 anybody else. That's not in this complaint. And
14 indeed, it can't be in the complaint because the
15 record illustrates that, for months, HealthSouth
16 decision making had been invested an independent
17 group who were not the hold into these people.

18 But it's not my burden to prove to you
19 that demand would be futile. The burden is on
20 the plaintiff to comply with Rule 23.1, and they
21 simply take a pass on it. There's no effort in
22 here with respect to UBS to provide Your Honor
23 with a particularized sort of statement. This is

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24 a threshold question. This litigation cannot and
25 should not be permitted to continue for another

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1 hour until they provide that to Your Honor and
2 they haven't. And for that reason and that
3 reason alone, the complaint is due to be
4 dismissed. Indeed, if we go into the allegations
5 of the complaint and you assume for a moment that
6 those are somehow particularized as to UBS, we
7 see that they haven't shown the absence of a
8 disinterested, independent Board.

9 Take what they say about Director
10 Strong, for example. They say he was on the
11 Audit Committee. They want to say that fact
12 somehow would make him reluctant to proceed
13 against UBS. I would suggest to Your Honor that
14 if that fact raises any presumption, it raises
15 the opposite presumption, that somebody on the
16 Audit Committee has a self-interest in going
17 after the alleged wrongdoing by a third party if,
18 in fact, there's been any such wrongdoing. They
19 don't relate that to UBS in the least. There is
20 not a word uttered in that complaint that says
21 Strong was not independent insofar as UBS was
22 concerned because of this, somehow related to
23 UBS. It's not there. It's not there as to any
24 Director. They seek just to say because they
25 were on the Board, because they were on the Audit

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1 Committee, because there was a threat of maybe
2 some insider trading action against them, all of
3 which may go as to why they were not independent
4 as the Officers and Directors. But it doesn't
5 tell Your Honor a thing with respect to their
6 claim against UBS.

7 You're simply being asked to take a
8 leap of faith that, because they have convinced
9 you back when the original complaint was filed
10 demand would have been futile, that it still
11 would have been futile all those years later in
12 August of 2003 when everything had changed at
13 HealthSouth. And, in fact, the record before
14 Your Honor indicates just the contrary, just the
15 contrary. And they have not made a
16 particularized showing that's required as to each
17 one of those Directors to indicate the majority
18 was something other than independent. It simply
19 does not exist.

20 Gordon, for example, another Director,
21 they want to say Gordon was not disinterested
22 insofar as UBS is concerned. Gordon is on the
23 Board now and has authorized HealthSouth to
24 proceed against UBS.

25 THE COURT: Is he one of the six that

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1 are going to resign as a result of the Teachers'
2 settlement?

3 MR. STARNES: I have no idea. The

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4 only thing I know is he's on the Board and
5 authorized HealthSouth to proceed against UBS,
6 but yet, they ask you to find that he never would
7 have authorized that in August of 2003. How can
8 you conclude that? Where is there some
9 particularized statement that affords you that
10 opportunity? The point of all this, Judge, is
11 they want you simply not to look at UBS
12 separately from everybody else, but the law
13 requires that you look at it separately from
14 everybody else. Where is the particularized
15 statement as to UBS that, in August of 2003, when
16 this case was first instituted against UBS, that
17 demand would have been futile? You can't find it
18 anywhere in those plethora of pages in this
19 complaint. It doesn't exist. If one looks at it
20 in an intellectually honest fashion, it is simply
21 not there as to UBS. And for that reason, 23.1
22 hasn't been complied with, and this motion to
23 dismiss is due to be granted.

24 THE COURT: Henry.

25 MR. SIMPSON: Again, Judge, I'm simply

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1 saying the issue is for the arbitrator under
2 Alabama law and federal law, and that it must go
3 to the arbitrators.

4 THE COURT: All right. Frank.

5 MR. DIPRIMA: Yes, Your Honor. Mr.
6 Starnes makes two or three points that I think
7 are factually wrong. One is he seeks to

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8 distinguish the date of the Third Amended
9 Complaint, which indeed is when we first named
10 UBS from the earlier dates. As we demonstrated
11 in our brief filed on June 17th or 18th on the
12 demand issue, the Board as of August 8th, 2003,
13 when we filed that Third Amended Complaint, was
14 ten members: Scrushy, Owens, Gordon, Strong,
15 Striplin, Chamberlin, Newhall, Givens, Hanson and
16 May. This Court found in its order of July 29
17 that as a separate and independent reason that's
18 independent of the Caplan case, which I'm going
19 to get to in a minute, for the said denial with
20 prejudice that's of all of the defendants'
21 motions to dismiss based on demand, the Tucker
22 amended complaints adequately plead that the
23 following directors were independence impaired
24 and/or not disinterested: Director Scrushy,
25 Owens, Striplin, Gordon, Chamberlin, Newhall,

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1 Givens, Watkins, May and Hanson, the same ten
2 people.

3 If our complaint pleads anything
4 vis-à-vis the defendants in this case, it pleads
5 that there was a single conspiracy, a single
6 breach of fiduciary duty aiding and abetting in
7 the case of UBS to falsely account for
8 HealthSouth's financial results. We certainly do
9 plead in paragraph 87 of our complaint that UBS
10 knew that the accounting materially overstated
11 HealthSouth's financial health. We plead with

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12 great specificity that UBS knew, was part of the
13 end game of that conspiracy which was to boost
14 the stock. We plead with specificity that their
15 top analyst KPEC was touting the stock on one
16 hand and trashing it in private in e-mails to his
17 friends and other investment bankers on the other
18 hand. The point is that UBS was a joint
19 tortfeasor with Scrushy and the others.

20 we haven't amended this complaint, as
21 you noted, Your Honor. We haven't amended it
22 every time the evidentiary facts change. We
23 don't think we have to. We didn't amend it to
24 plead the meeting at the lake between Martin and
25 UBS officials involving Scrushy. We don't think

29

1 we need to. We think there's plenty of
2 specificity in this complaint. But the point is
3 that these Directors, these same ten Directors
4 that Your Honor already ruled were either
5 independence impaired or not disinterested or
6 both as regard all the other torts in this
7 complaint, as to all claims and all defendants.
8 How they can rule independently on a demand to
9 sue UBS is beyond me. I don't think there's any
10 way they can.

11 Let's put it another way. You go to
12 the Board and you say, we demand you sue UBS
13 based on this set of facts, based on these torts,
14 based on this conspiracy. A decision to sue UBS
15 by eight of these ten people who are defendants

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16 in this case, everybody but May and Hanson, a
17 decision to sue UBS brings each one of them one
18 step closer to liability, because they're being
19 accused of the same tort as UBS is being accused
20 of.

21 Next, as far as the Caplan case is
22 concerned, there's no question that the Caplan
23 case precludes this suit. Mr. Starnes says, no,
24 it's different because the neutrality that the
25 corporation pled only relates to the initial

30

1 complaint. well, that's absolutely incorrect.
2 In the preface to the complaint -- rather, to the
3 answer -- the Corporation states the following.
4 This is at page three of HealthSouth's
5 corporation's answer. "In answering the
6 complaint" -- and this a quote -- "In answering
7 the complaint, unless otherwise indicated herein,
8 HealthSouth has assumed that any reference to its
9 Board of Directors refers to HealthSouth Board of
10 Directors as it was then constituted as of April
11 8th" -- I'm sorry. I misspoke -- "as it was then
12 constituted as of August 8th, 2003." Then
13 sixteen times in this, including the provisions
14 that specifically refer to UBS, what does the
15 Corporation say? They said we're neutral.

16 THE COURT: What are you reading from?

17 MR. DIPRIMA: I'm sorry, Your Honor.
18 I'm talking too fast. I'm reading from the
19 Corporation's pleading dated May 28th, 2004, the

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same pleading in which --

21 THE COURT: They filed in this case?

22 MR. DIPRIMA: They filed in this case.

23 MR. SOMERVILLE: That is the answer.

24 MR. DIPRIMA: It's their answer and

25 it's the same --

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1 THE COURT: Let me see that, because I
2 was looking for that and I don't have it. I
3 don't know the exact language.

4 MR. DIPRIMA: May I, Your Honor?

5 THE COURT: Please.

6 MR. DIPRIMA: I'm sorry. It's printed
7 on both sides of the page so I don't have to
8 carry too much stuff.

9 THE COURT: When was the Fourth
10 Amended Pleading filed?

11 MR. DIPRIMA: The Fourth Amended
12 Pleading --

13 THE COURT: In March of '04?

14 MR. DIPRIMA: March of '04, Your
15 Honor, before this.

16 THE COURT: But that did not add
17 either UBS or Ernst & Young?

18 MR. SOMERVILLE: That's right.

19 MR. DIPRIMA: It extended the basis
20 for damages against UBS and E&Y.

21 THE COURT: Okay. Where is the
22 particular answer where they stress they remain
23 neutral?

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24 MR. DIPRIMA: It occurs in at least
25 sixteen places. I'd have to scramble, but it's
32

1 in --

2 THE COURT: Further HealthSouth
3 admits -- I'm reading from page 43, subparagraph
4 F, the last sentence. "Further, HealthSouth
5 admits that it will remain neutral on the issue
6 of whether the demand was futile as of August 8,
7 2003 and not filed a motion to dismiss pursuant
8 to Alabama Rule 23.1." I assume that is
9 referencing a specific claim in the case.

10 MR. DIPRIMA: They do it again and
11 again, Your Honor, in connection with the demand
12 excusal provisions of the -- They do it for
13 specific demand excusal allegations, and then
14 they do at the end, at the very end of the answer
15 or in summary as to those. I can help you on
16 that if I had another copy.

17 THE COURT: Okay. Thank you. I
18 appreciate it.

19 MR. DIPRIMA: But there's no doubt
20 that the statements of neutrality apply to every
21 demand excusal allegation in every claim in the
22 complaint. And if I'm wrong about that, I'm sure
23 Ms. Cooper will correct me.

24 MR. STARNES: Would you like for me to
25 correct you as opposed to Ms. Cooper?

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1 MR. DIPRIMA: The very last numbered
2 allegation in the answer, Your Honor.
3 HealthSouth lacks knowledge or information
4 sufficient to form a belief, blah, blah. Except
5 that HealthSouth admits that it will remain
6 neutral on the issue of whether demand was futile
7 as of August 8th, 2003 and not file a motion to
8 dismiss pursuant to Alabama Rule 23.1. Now, that
9 was about the sixteenth or seventeenth time in
10 the complaint that they declared neutrality,
11 including as paragraphs where we specifically
12 allege against -- I'm not done --

13 MR. STARNES: I thought you sat down.

14 MR. DIPRIMA: -- against UBS.

15 THE COURT: Did I not read some
16 Delaware cases that maybe one or both of you
17 submitted that held such an answer was applicable
18 not only to the Officers and Directors of the
19 company, but was also applicable to third parties
20 to which claims have been filed?

21 MR. DIPRIMA: Absolutely, Your Honor.
22 The leading case that makes this black letter
23 law, neutrality means demand -- corporation
24 neutrality means demand is excused. That case
25 did not -- That case is encaptioned Caplan versus

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1 Pete Morwick.

2 THE COURT: There's cases -- I don't
3 remember them all.

4 MR. DIPRIMA: I'm sorry. In Caplan, a
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5 derivative action was defended against by Pete
6 Morwick, the company's accounting firm, saying
7 lack of demand. The plaintiff said, you have no
8 standing to raise the demand issue. Only the
9 corporation has standing. And the plaintiffs won
10 on the lower level. On appeal, the Delaware --

11 THE COURT: So it is Delaware law, as
12 I understand it, that third parties against whom
13 claims are asserted can raise the demand of
14 futility.

15 MR. DIPRIMA: They can raise it. But
16 as far as the corporation pleads neutrality --
17 and I see Ms. Cooper is in the unaccustomed
18 position of agreeing with me on some things. As
19 soon as they declare neutrality, that's the end
20 of it as a matter of law.

21 THE COURT: In other words, third
22 parties can enjoy the benefit of demand, but they
23 are bound by the acts of the Board of Directors.

24 MR. DIPRIMA: Exactly. And once they
25 declare neutrality, that's it. And that was a

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1 case -- That case, the motion was brought by the
2 third party; namely, the company's accounting
3 firm.

4 THE COURT: All right.

5 MR. DIPRIMA: Now, just one final
6 point. I have two responses to Mr. Starnes'
7 comment that, by August 8th, 2003, the company
8 was being run by a Special Committee. I have

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9 seen that allegation before and I've heard it
10 argued about the last time we were arguing about
11 demand. The two answers to that are, one, it's
12 irrelevant under Delaware law. There's a very
13 clear-cut way of calculating it. There must be a
14 majority that can act independently. If there
15 are ten, impairing five is enough to excuse
16 demand. There's no exception for Special
17 Committees in Delaware law. I think we're here
18 to apply Delaware law, and I think everybody's
19 conceded that.

20 The second thing is who was on that
21 Special Committee. Guess what? It was everybody
22 but Scrushy. It was a committee of the Board
23 comprising the entire Board except Scrushy. I
24 don't even get to whether or not that's properly
25 constituted. I don't know. I don't know enough

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1 facts. But that means that the people that you
2 have already held to be independence impaired are
3 not disinterested had not only majority, but a
4 unanimous one on that Special Committee that
5 they're relying on.

6 And finally, I want to make one other
7 point, and that is what -- I believe that there's
8 a disagreement between Mr. Starnes and me about
9 what this Court already ordered. There may not
10 be -- If you agree with me on substance, it may
11 not be relevant. But this Court ordered that the
12 Corporation's pleading of neutrality on the

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13 demand issue, demand is excused as a matter of
14 law as to all defendants herein, one of the
15 principles of Caplan v. Pete Morwick. All
16 defendants here includes UBS and Ernst & Young.
17 There's a reservation that I'll get to. Then the
18 Court held or Your Honor held, "As a separate and
19 independent reason for said denial with
20 prejudice, Tucker's amended complaints adequately
21 plead that the following Directors were
22 independence impaired and/or not disinterested,"
23 and it names the ten of them. "And thus, demand
24 is excused as to all claims pled to date against
25 all defendants." And that's all these claims to

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1 which we allege UBS is a joint tortfeasor.
2 Then Your Honor goes on and says,
3 "Notwithstanding the above, under a schedule to
4 be set by this Court for consideration of motions
5 to dismiss, defendants E&Y and UBS and only those
6 defendants will be given the opportunity to
7 submit non-redundant briefs in the nature of
8 reargument." In other words, tell me something
9 new. I continue to quote, "On issue of demand,
10 covering those arguments that they have not
11 already made in submissions," et cetera, "UBS and
12 E&Y's new briefs, if any, in response to this
13 item four shall be submitted in connection with
14 the motion to dismiss on other issues with a
15 schedule to be set by this Court." And except
16 for those letters, there have been no such

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17 submissions. So I submit to Your Honor
18 respectfully that Your Honor has already decided
19 the motion to -- the demand motion as against E&Y
20 and UBS subject only to your acceptance of briefs
21 in the nature of reargument, if they have
22 something new to say. I haven't heard anything
23 new today, Your Honor. Thank you.

24 THE COURT: Okay.

25 MR. SIMPSON: Just briefly on the E&Y

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1 argument. What happened, what was at a pose here
2 was HealthSouth's position, one, agreeing --
3 finally agreeing that all the claims were
4 arbitrable and then filing its complaint against
5 E&Y.

6 THE COURT: Let me ask a question. My
7 practice in all of these contested matters is to
8 have a hearing and then either request the
9 parties to submit proposed orders or, if I have
10 made a ruling, request the parties to send me an
11 agreed upon order. That's been my practice in
12 this case. I announced my rulings, as I recall,
13 at the conclusion of the July 26 hearing, did I
14 not? I think it's a matter of record that I
15 announced by ruling. My recollection is, without
16 going back and reading that transcript, I asked
17 the parties to send me an agreed upon order
18 consistent with my rulings on the record. Did I
19 not do that?

20 MR. SOMERVILLE: Your Honor, as I

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21 recall, we submitted one order and the other side
22 submitted another order. That's my recollection
23 with respect to your ruling on that demand issue.

24 THE COURT: Demand futility?

25 MR. SOMERVILLE: Yes, sir. I don't

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1 think we tried to agree upon an order with the
2 other side.

3 MR. STARNES: And we never submitted
4 anything, because that wasn't part of it. On
5 that day --

6 THE COURT: All right, all right.

7 MR. STARNES: On that day, you said
8 you were going to hear --

9 THE COURT: I just wanted y'all to
10 refresh my recollection about that, because I
11 didn't actually remember. It's on the record. I
12 know that.

13 MR. STARNES: Neither Henry nor I
14 submitted anything, and we didn't take place in
15 the argument that morning. I've got the
16 transcript.

17 THE COURT: I think the plaintiff
18 concedes that, that y'all did not participate in
19 sending the order that I entered.

20 MR. SOMERVILLE: We sent a copy of it
21 to them, and I believe that -- I could be
22 mistaken about this, but I believe that Henry
23 wrote a letter to Your Honor about that proposed
24 order, but I could be mistaken about that. we

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25 sent it to them and gave them full opportunity to
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1 submit something themselves.

2 MR. DIPRIMA: Your Honor, I believe --

3 MR. STARNES: Excuse me. You accepted
4 from what you were hearing that morning the
5 motions to dismiss of UBS and E&Y. One reason
6 you accepted that is because you had before you
7 the HealthSouth motion for realignment in which
8 HealthSouth --

9 THE COURT: That was argued that
10 afternoon.

11 MR. STARNES: It was argued that
12 afternoon after that motion was argued, in which
13 you said -- in which HealthSouth said they wanted
14 to prosecute the claims against UBS. We said
15 that morning that it made no sense for you to
16 consider UBS's motion, because if you granted the
17 realignment motion, the demand futility would
18 have a totally different cast than it otherwise
19 had. That's why Henry and I didn't come back
20 that afternoon, or at least I didn't, because we
21 agreed to set the motions to dismiss for E&Y and
22 UBS over to a later date. And you accepted the
23 motion to dismiss in the order you entered.

24 THE COURT: All of this is in the
25 transcript.

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1 MR. STARNES: Yes, sir. If you go

2 through that entire transcript --

3 THE COURT: I have it.

4 MR. STARNES: In all of the arguments

5 that the plaintiff presented to you that morning

6 and the other defendants, UBS wasn't an issue.

7 E&Y wasn't an issue that morning. The demand

8 futility was based on the demand futility at the

9 time the original complaint was filed, because

10 those were the defendants making the arguments

11 before you that morning. I mean, this is sort

12 of -- Frankly, I don't believe anybody other than

13 Mr. DiParma -- and maybe I'm wrong.

14 MR. DIPRIMA: DiPrima, sir.

15 MR. STARNES: I'm sorry. Mr.

16 DiPrima thought that UBS motions for dismiss were

17 being argued that morning. I certainly didn't.

18 Henry certainly didn't. We were here and we

19 never argued. The reason we didn't argue is

20 because the HealthSouth motion to realign could

21 have changed everything, and you weren't going to

22 decide that until the afternoon.

23 THE COURT: I had to go back and read

24 all that material before.

25 MR. STARNES: That's right.

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1 THE COURT: Okay. I'm ready to move

2 on, then.

3 MR. STARNES: Let me just respond

4 briefly to the points that Mr. DiPrima made.

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5 First of all, he said it was beyond him how
6 anybody could find that demand would have been
7 anything other than futile. Well, it may be
8 beyond Mr. DiPrima, but that's not the test under
9 the rule. The test under the rule is you don't
10 come in and say it's beyond me as to how it could
11 be anything but futile. You have to as to this
12 defendant plead particularized facts as to why it
13 would have been futile. And you have to make
14 that particularized pleading directly as to UBS
15 as of the date they were added, which was a much
16 later date, August of 2003. The Caplan case that
17 they cite is very different from this case. That
18 was a case in which the Corporation came in and
19 filed a position --

20 THE COURT: What I got out of that
21 case when I read it, which was some months ago,
22 was that a filing of neutrality by the corporate
23 defendant was binding upon the issue of demand as
24 to Officers and Directors and any third party
25 defendants.

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1 MR. STARNES: It was in that case
2 because it was specifically filed; that is, the
3 position of neutrality was specifically filed as
4 to the motion to dismiss which had been filed by
5 the third parity.

6 THE COURT: But in their answer filed
7 in this case, they specifically state that they
8 are taking the position of neutrality as of as

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9 late as August 8, 2003, which was the time that
10 the amendment was filed adding both UBS and E&Y.

11 MR. STARNES: They do not say at any
12 point that they're taking a position of
13 neutrality as to the motion to dismiss filed by
14 UBS, which is what was the case in Caplan. So
15 that distinguishes Caplan in its entirety. And
16 at the time HealthSouth filed that answer that
17 you're talking about in this case, there were
18 still claims pending against HealthSouth Officers
19 and Directors, not the situation in Caplan, and
20 there were claims pending and HealthSouth itself
21 was a defendant. So the neutrality issue
22 HealthSouth was expressing then is totally
23 different. And nowhere that I recall does UBS
24 say at any point that they're taking a position
25 on neutrality with respect to a demand against

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1 UBS.

2 And indeed, if you look at what else
3 HealthSouth filed, you see that in the
4 realignment motion, they say, quote -- this is
5 HealthSouth -- "It is beyond question that a
6 clear majority of the current Board and the
7 Special Committee through which the Board has
8 operated since April 2003 is independent and
9 disinterested with respect to the prosecution of
10 the claims against E&Y and UBS". Now, how can
11 you be expected to ignore that, because that
12 clearly -- that statement by HealthSouth clearly

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13 informs the Court as to what their position on
14 demand neutrality was. And what I think it was
15 is what HealthSouth said it was in that same
16 motion where they said HealthSouth took a neutral
17 position as to whether demand on the company's --

18 THE COURT: What specific motion are
19 you referring to?

20 MR. STARNES: Their realignment
21 motion, where they came in and said, let us
22 prosecute the claims.

23 THE COURT: I'm referring to the
24 answer.

25 MR. STARNES: Right. And if you look

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1 at the answer when you say they're neutral, I
2 don't recall anywhere in that answer where it
3 says, we're neutral on the question of demand
4 futility insofar as UBS is concerned.

5 THE COURT: It didn't by any
6 defendants.

7 MR. STARNES: That's right. And they
8 were themselves a defendant at that point in
9 time. There were claims being made against
10 Officers and Directors of HealthSouth at that
11 point in time.

12 THE COURT: I understand the
13 arguments. I believe I understand the arguments
14 that the parties are making on demand. Frankly,
15 I'm really ready to move on to something else.

16 MR. DIPRIMA: May I just add one

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17 thing? I do want to add one more thing, John.
18 Excuse me. That is I think Mr. Starnes misstated
19 one very crucial fact, and that is time and time
20 again in our demand futility allegations that
21 begin on paragraph 130 of the complaint and
22 continue through paragraph 137 --

23 THE COURT: Hold on a minute. 137?

24 MR. DIPRIMA: 130 to 137 are our
25 demand futility allegations, Your Honor.

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1 THE COURT: I don't have my notes
2 about those paragraphs.

3 MR. DIPRIMA: May I just read it? In
4 paragraph 133, which is kind of a long paragraph,
5 "Any independence impairment pled herein excuses
6 demand as relates to the claims against E&Y and
7 the UBS parties and fictitious defendants as
8 their alleged conduct is inextricably interwoven
9 with or at least closely related with Scrushy and
10 Director defendants," et cetera. "The finding
11 that E&Y is liable or that UBS and fictitious
12 defendants w through Z are liable based on the
13 facts alleged herein would make it more likely
14 that Scrushy and the Director defendants would be
15 held liable." We say this about six or eight
16 times in that series of paragraphs. What does
17 the Company say? Paragraph 133, we're neutral.
18 So they say it again and again. Only if one
19 doesn't read this complaint could he buy into Mr.
20 Starnes' argument that we failed to plead

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specifically demand as to UBS.

22 THE COURT: Okay.

23 MR. STARNES: One brief point on that.
24 That eviscerates the rule, because all that means
25 is you come in and say the conduct of one

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1 defendant is inextricably linked with the conduct
2 of another as to who demand is excused and,
3 therefore, it's excused as to that. That was to
4 take the rule and ruling it null. It's
5 meaningless.

6 THE COURT: We could spend the rest of
7 the year going back and forth. Let's move on to
8 greener pastures. All right. We've got your
9 argument with regard to the forum selection
10 clause.

11 MR. STARNES: That's one of them. We
12 have got fraud arguments. I mean, there's a
13 whole host of different things, and we'll go
14 through them however Your Honor wants to.

15 THE COURT: I'd like to address the
16 forum selection clause first, then we will get to
17 the others together. At the time of the last
18 hearing, I don't believe I had read the various
19 Alabama Supreme Court decisions, and I don't know
20 that the eBay decision was out, the eBay decision
21 in Delaware was out. Maybe it was, but I don't
22 remember y'all giving it to me.

23 MR. DIPRIMA: If we didn't, it was an
24 oversight for which I apologize. I thought it

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25 was in the packet of decisions that we did give
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1 you.
2 THE COURT: As I understand it, the
3 decisions issued written by Woodall -- and did
4 Harwood write another one that dealt with -- and
5 these are my words -- the claims being so
6 intertwined such that if you split the cases and
7 sent one up to New York and one stayed here, you
8 would have unfairness to both parties. You would
9 have lack of judicial economy, and those are all
10 factors which the Trial Court should take into
11 consideration in determining whether to send part
12 of the case to another court under the forum
13 selection clause. Have I misstated that?

14 MR. STARNES: I think you've stated it
15 right. I think you have to -- Clearly, none of
16 that applies in this case because the plaintiff
17 and E&Y have agreed that those claims are due to
18 go off to arbitration to another forum.

19 THE COURT: But you're asserting the
20 contract claims against you are due to go to New
21 York?

22 MR. STARNES: To another forum.
23 That's right. That's exactly right. And the
24 plaintiff has agreed that the E&Y claims are due
25 to go off to another forum, and those are at

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1 least as inextricably --
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2 THE COURT: That's arbitration.
3 That's not a forum selection clause.

4 MR. STARNES: It's not a forum
5 selection clause, but it's a different forum
6 altogether. You're taking one set of claims in
7 this case and sending them off somewhere else.

8 THE COURT: But arbitration is lost.

9 MR. STARNES: So it's a forum
10 selection clause.

11 THE COURT: That's an agreement
12 between the parties.

13 MR. STARNES: You had two mature
14 corporations say if there's going to be a breach
15 of contract case, it's going to be in New York.

16 THE COURT: The only issue I'm
17 addressing, that issue relates to UBS and not
18 E&Y.

19 MR. STARNES: That's right. The only
20 point I'm making is when the plaintiff says that
21 we're happy with these arbitration provisions to
22 be enforced and this set of claims will go off
23 somewhere else --

24 THE COURT: If I, as the Court,
25 determine as a matter of law that those claims

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1 are arbitrable, the plaintiff can object all he
2 wants to.

3 MR. STARNES: Sure.

4 THE COURT: But I make that
5 determination as a matter of law.

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6 MR. STARNES: That's right.

7 THE COURT: Plaintiff has no
8 discretion in that matter.

9 MR. STARNES: That is true. As I
10 understand it here, the plaintiff agreed the
11 arbitration clause applied, didn't ask you to
12 rule.

13 THE COURT: I think the parties agreed
14 that it was subject.

15 MR. HALEY: I mean, we didn't like it,
16 but that's what the contract says.

17 MR. STARNES: Sure. And the contract
18 also says it's forum selection clause. The
19 arbitration clause doesn't have any higher
20 meaning than the forum selection clause.

21 THE COURT: Address to me, Stan, how
22 it would not be unfair and it would not be
23 contrary to judicial economy in the interest of
24 the parties to send the contract claim to New
25 York and keep the rest of them here, if that's

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1 what I decided.

2 MR. STARNES: It would not be unfair
3 for one simple reason. You had two sophisticated
4 people in the marketplace, two very, very large
5 concerns that when they sat down to tailor their
6 relationship, they said and agreed, if there is a
7 breach of contract claim, it will be decided in
8 New York. For that simple reason alone, the
9 Court should enforce it. The parties agreed to

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10 it. This isn't a case where you've got a
11 consumer and a huge corporation imposing the will
12 of the latter on the forum. This is a case in
13 which two sophisticated commercial entities said,
14 this is our deal, we know what we're doing. They
15 agreed to it.

16 The question, I think, is why should
17 you undo their deal. They knew when they entered
18 this agreement that there might be related claims
19 that perhaps weren't covered by the forum
20 selection clause. But knowing that, they still
21 entered it. Why is it unfair to hold two
22 sophisticated commercial entities to the bargain
23 they paid for and agreed to? Because if you say
24 that I'm not going to enforce a forum selection
25 clause among sophisticated people under these

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1 circumstances, then that renders them all
2 unenforceable, because the person wanting to
3 avoid the forum selection clause will simply put
4 some other claim in or some other defendant in
5 and say they're inextricably linked, let's move
6 on. So it's just a back-door nullification of
7 forum selection clauses. There may be some
8 reasoning to do that if you have people of
9 disparate bargaining positions. But there is no
10 reason to do that when you've got two
11 sophisticated commercial entities that go into
12 the marketplace and say, here is our deal.

13 THE COURT: Suppose I decide that the
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14 tort claims asserted against UBS are not due to
15 be dismissed at this time, but then I decide to
16 send the contract claim against UBS up to New
17 York. why would that not be unfair to UBS to
18 require them to litigate the same factual
19 circumstances in two separate forums?

20 MR. STARNES: Because it's what they
21 agreed to do. You know, they're big guys. They
22 understand what they're doing. You can't --
23 Judge, you can't come in after the fact behind
24 every contract when you're talking about
25 commercial entities that are big sophisticated

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1 entities and say is this fair or unfair. It's
2 what they agreed to do. The contracts are
3 enforceable. There's nothing against public
4 policy, and the Supreme Court has specifically
5 said they're enforceable. And if you accept the
6 interpretation that's being urged on you, you are
7 nullifying the contracts. What is the harm --

8 THE COURT: I'm just reading Woodall's
9 case and the other cases. That's all I'm doing.

10 MR. STARNES: Right. What I'm saying
11 is you didn't have two sophisticated entities
12 like you do here. What I'm saying is if you
13 could get around the forum selection clause by
14 simply joining other defendants or claims that
15 allegedly weren't covered by the clause and
16 saying they're inextricably linked, which
17 everybody always would, then you're nullifying

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18 the clause. Tell me what is wrong with letting
19 two commercial entities bargain with each other
20 and, when they reach an agreement, as everybody
21 admits they reached, saying I'm going to leave
22 you where you find it.

23 THE COURT: I'm sure Frank is going to
24 answer that.

25 MR. STARNES: What is wrong with

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1 saying to these two entities, I'm going to leave
2 you to the deal you made. You bargained for it,
3 you made it, stick with it. People proceed in a
4 different forum all the time with the same
5 claims. Maybe it's not fair. Maybe it's not
6 efficient. But it's what they agreed to do.
7 Frankly, I think the Court has lots of reasons,
8 because in circumstances like this where you've
9 got sophisticated entities, so leave them exactly
10 where you find them. They made this deal. Now
11 they need to keep their word and not seek to have
12 you undo it because of alleged unfairness. There
13 are other parts of that I can address, but I'm
14 just answering your questions.

15 MR. DIPRIMA: Your Honor, to begin
16 with, this Court has the broadest discretion
17 permissible under the Constitution to decide
18 whether or not to enforce this forum selection
19 clause. Based on cases we've cited, it's a
20 matter of venue, not of jurisdiction. Matters of
21 venue in the Daimler Chrysler case, which we also

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22 cited, are appealable only under a writ of
23 mandamus, and the standard then is, is it
24 arbitrary and capricious. So you have the
25 broadest discretion, Your Honor, conceivable

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1 under the Constitution.

2 Next, the question is, does it make
3 sense to enforce this forum selection clause,
4 given the fact that you have that kind of
5 discretion.

6 THE COURT: Why should it not be
7 binding upon you because you're the derivative
8 plaintiff rather than HealthSouth? Why should it
9 not be binding upon you?

10 MR. DIPRIMA: I don't argue it's not.
11 I think that if Ms. Cooper were bringing this
12 claim, I'd be making the same arguments. The
13 sophisticated commercial entities, that didn't
14 apply into the Galaxy decision. It may be that
15 there was disparate power. But the Galaxy
16 decision that we cited and relied on in our brief
17 is not a case of unconscionability. It's not a
18 case of a contract of adhesion or anything of the
19 kind. That case went off on one very simple
20 principle, that the facts were -- and it's a
21 phrase that's used again and again in the case --
22 inextricably intertwined. Had the forum
23 selection clause been enforced in Galaxy Mall,
24 part of the case would have gone to Utah and part
25 of the case would have gone to Massachusetts.

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1 And some of the fact finding that was --

2 THE COURT: Let me interrupt you and
3 let me address this question to both of you. I
4 read in, I think, Stan's letter and affidavits
5 that you filed, you assert a forum selection
6 clause in a 2002 contract, and then Frank takes
7 issue and says it was August of 2000. I'm not
8 sure I understand all that. But am I correct in
9 understanding that the first document executed by
10 UBS and HealthSouth which does, in fact, contain
11 a forum selection clause is a 2002 document?

12 MR. DIPRIMA: May of 2002, Your Honor.

13 THE COURT: Am I correct about that?

14 MR. STARNES: Here's the answer to
15 that. I don't know and here's why I don't know.
16 The plaintiff never has told us what contract
17 HealthSouth alleges we breached. That's nowhere
18 in this complaint.

19 THE COURT: Well, in the complaint,
20 they are alleging actions that go back to 1998.

21 MR. STARNES: Right. But they never
22 allege -- they have never said the contract that
23 we breached. I put in that first affidavit this
24 is an exemplar of the types of contracts that
25 HealthSouth and UBS entered. This one's got the

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1 forum selection clause. In none of their papers

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2 do they say that the earlier contracts don't have
3 forum selection clauses.

4 THE COURT: I understand that.

5 MR. STARNES: But I can't tell you
6 that I can give you copies of the contracts that
7 they are alleging that are a breach here because
8 I don't know which ones they're alleging were
9 breached. But my understanding is --

10 THE COURT: Is that a point that
11 should be significant to me?

12 MR. STARNES: I don't think so.

13 THE COURT: As the Court?

14 MR. STARNES: I don't think so. Even
15 if you go back to the earlier contracts, I've not
16 heard them deny that those contracts contain
17 forum selection clauses.

18 MR. DIPRIMA: Well, that's a little
19 unfair. We're going to find out in discovery,
20 Stan, what those forums -- what contracts there
21 were and what forum selection clauses there were.
22 Mr. Starnes can't stand here and tell you to send
23 some claims up to New York based on contracts
24 that he hasn't produced.

25 THE COURT: In my mind, if the

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1 earliest contract that contains such a clause is
2 in 2002, that impacts how all these issues are
3 intertwined with each other.

4 MR. STARNES: Well, then I think that
5 the only way in fairness to answer that is for us

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6 to get all the contracts. We don't have them,
7 and I gather they don't have them.

8 MR. DIPRIMA: This is a motion to
9 dismiss.

10 MR. STARNES: I understand. But your
11 obligation in the complaint is to tell me what
12 contract I breached and you don't do that. So I
13 went and got the clause that was in a contract
14 that I could get my hands on that was executed
15 and has this clause is it. I am told that they
16 all have it in it, but I can't represent that to
17 the Court because I don't know. But the
18 plaintiff has come forward and said, you breached
19 the contract, but they didn't say which one we
20 breached. And if they think there's a contract
21 that doesn't have a forum selection clause that
22 we breached, they ought to allege that. They
23 don't.

24 THE COURT: All right. Go ahead,
25 Frank.

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1 MR. DIPRIMA: Your Honor, that's all
2 the more reason for discovery. I understand that
3 discovery for the time being is on hold. The
4 nature of our contract claims in this action,
5 which I grant you were secondary, to the breach
6 of fiduciary duty, aiding and abetting the breach
7 of fiduciary duty and suppression of claims. The
8 contract claims are of lesser order in centrality
9 and magnitude. There were a lot of contracts.

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10 They represented HealthSouth. They are always
11 engagement letters. To the extent they were --
12 that Mr. Starnes' clients were paid big fees for
13 all this misfeasance and all this aiding and
14 abetting financial fraud, they ought to pay those
15 fees back. Now, do I know the dates of those
16 contracts? No. Do the public statements of
17 HealthSouth say what the dates were? No.

18 Mr. Starnes was good enough to provide
19 a couple of them, but they're both based on 2002.
20 I don't think Mr. Starnes can stand here and ask
21 you to dismiss or ship up to New York claims
22 against other contracts that he didn't provide
23 with his dismissal motion.

24 THE COURT: Okay.

25 MR. STARNES: He still hasn't answered

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1 the question. Why is it unfair to these
2 commercial entities to require them to abide by
3 the agreement? Mr. DiPrima did not answer that
4 question. The reason he didn't answer the
5 question is because he knows, as we all know,
6 that in the real world, companies like this ought
7 to be held to what they agreed to and not have
8 you come in after the fact and try to extricate
9 themselves from what they agreed to. But the
10 real reason is that if you permit anybody that
11 comes up here that has two sophisticated
12 commercial entities that have entered a forum
13 selection clause and they can nullify that clause

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14 by adding other defendants or other claims, then
15 you might as well just say they're not any good.
16 They're against public policy. That will be the
17 course of every time they brought it up.

18 THE COURT: Let me -- This may not be
19 a pertinent question at this stage. How many
20 direct players up at UBS are involved in this?

21 MR. STARNES: Individuals?

22 THE COURT: Yes.

23 MR. STARNES: I don't have a clue.

24 THE COURT: Okay. All right.

25 Anything else, Frank, on that issue?

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1 MR. DIPRIMA: Only that this Court is
2 going to have a big trial involving the
3 accounting fraud, involving the end game of the
4 accounting claim.

5 THE COURT: I hope y'all are going to
6 come to your senses. Go ahead.

7 MR. DIPRIMA: Sorry, Your Honor. But
8 this Court is going to have a big trial involving
9 all of the issues, and UBS is going to be central
10 to those issues. If it turns out there was no
11 accounting fraud -- Let's take an extreme
12 example. If it turns out there was none and
13 we're totally wrong about that, they're going to
14 want to take advantage of that. UBS is not going
15 to be liable if there was no accounting fraud at
16 all. The conspiracy we allege, the civil
17 conspiracy we allege, the aiding and abetting we

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18 allege wherein UBS knew, which we allege in
19 paragraph 87 of our complaint, knew the
20 financials overstated the financial fraud. These
21 very same issues that are critical here are going
22 to be critical in the contract case if there's a
23 separate contract case.

24 The elements of aiding and abetting,
25 which a Delaware tort and this Court, I submit,

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1 will be applying Delaware law, the first element
2 of that is was there a breach of fiduciary duty
3 by the named fiduciary; namely, the Directors and
4 officers. There's going to be a big trial on
5 that. Why have two trials, one here and one in
6 New York? No one could have foreseen when these
7 contracts were entered into -- and by the way,
8 drafted by UBS, as we allege in our papers -- no
9 one could have foreseen a case of this size and
10 this magnitude. Furthermore --

11 THE COURT: I tell you, what Stan is
12 arguing is the tort claims versus the D & O's may
13 not be an issue in New York under the breach of
14 contract claim.

15 MR. DIPRIMA: Oh, I think they will.

16 THE COURT: Why?

17 MR. DIPRIMA: Why? Because I think
18 the basis on the breach of contract claim is as
19 we allege in the complaint, that UBS did not
20 faithfully uphold its contractual duty to provide
21 fair investment banking services to the

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22 Corporation. And therefore, they ought to pay
23 all the fees back. We allege that both in our
24 contract and our unjust enrichment counts. So
25 it's really all part of the very same intertwined

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1 factual basis. And whether Mr. Starnes agrees
2 with it or not, Galaxy Mall is the law of the
3 jurisdiction. Galaxy Mall holds that where the
4 enforcement of a forum selection clause results
5 in --

6 THE COURT: Is that Woodall or
7 Hardwood's case?

8 MR. STARNES: Woodall.

9 MR. DIPRIMA: Results in splitting
10 causes of action, then it's not enforced. Then
11 it's unreasonable and not enforced. Galaxy Mall
12 holds that where the complaint is not a
13 subterfuge to avoid a forum selection clause and,
14 in this context, is not enforced. And it holds
15 that where it violates the strong public policy,
16 it's not enforced. And here, there's a strong
17 public policy in the State of Alabama against
18 splitting causes of action. Galaxy Mall simply
19 controls this case as far as forum selection is
20 concerned.

21 MR. STARNES: First of all, Galaxy
22 Mall has not been released for publication,
23 whatever impact that has on Your Honor.

24 THE COURT: It used to be that that
25 would be a valid point and I should not consider

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1 it as good law.

2 MR. STARNES: I don't say that.

3 THE COURT: That rule has been
4 changed.

5 MR. STARNES: But it hasn't been
6 released for publication and is still within the
7 breast of the Court. Let's assume it has been
8 released for publication and let's assume it is
9 good law, and I don't suggest to you that you
10 should consider anything other than good law.
11 what it says was, in order for these things that
12 he's talking about, splitting the cause of
13 actions, the inextricable linking of the claims,
14 in order for that to cause you not to enforce the
15 forum selection clause, you would have to
16 conclude in the words of the Supreme Court -- and
17 I'm quoting but for the use of the parties' names
18 in this case -- that a trial in New York would be
19 so gravely difficult and inconvenient as to
20 deprive HealthSouth of its day in court. Now,
21 nobody can suggest to you that's the case. And
22 the Supreme Court said only if that's the case do
23 these things like splitting causes of action and
24 inextricable linking should that apply. You've
25 got to find that a trial in New York would be so

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1 gravely difficult and inconvenient as to deprive
2 HealthSouth of its day in court. This trial

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3 would be about, I think, 30 miles from Mr.
4 DiPrima's office in New York.

5 THE COURT: All right. We've got some
6 other issues. We've got the motion to dismiss,
7 Stan, that you wanted to argue.

8 MR. STARNES: Yes, sir.

9 THE COURT: Okay.

10 MR. STARNES: I'll just take these by
11 discrete claims, that way it will be easy for us
12 to deal with, if that suits Your Honor as well.
13 I mentioned to you earlier the plaintiffs
14 perceive license to ignore Rule 23.1 of the
15 Alabama Rules, and that's not the only rules they
16 perceive license to ignore. They've ignored Rule
17 9 as well.

18 THE COURT: The statute of
19 limitations.

20 MR. STARNES: Stating a fraud claim
21 against a defendant, you have to -- in the words
22 of the Rule -- with specificity allege the fraud.
23 The Supreme Court has said over and over and over
24 again that means time, who did it, who said what,
25 who omitted what, what the contents of the

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1 representation were or the omission were, what
2 were the facts of the fraud, date, time, place,
3 who, where and when.

4 THE COURT: But that really becomes
5 relevant, does it not, only if at this stage of
6 the game a determination is made that they knew

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7 or should have known of the alleged wrongdoing
8 between HealthSouth and UBS.

9 MR. STARNES: No. There's a fraud
10 claim. There's a straight up fraud claim against
11 UBS. If I have misread the complaint about there
12 being a fraud claim, I'll sit down. But I
13 perceive in that complaint there's a straight up
14 fraud claim against UBS.

15 THE COURT: I read the complaint as
16 asserting four years of activity. That's the way
17 I read the complaint.

18 MR. STARNES: I'll just ask the
19 plaintiffs. Does the plaintiff make a claim for
20 fraud against UBS in this case?

21 MR. DIPRIMA: Fraud is more than
22 enough to support a claim of aiding and abetting,
23 but it is not necessary to support a claim of
24 aiding and abetting.

25 MR. STARNES: I read the complaint as

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1 stating a fraud claim. If there is a fraud claim
2 and if they intend to pursue fraud, intend to
3 pursue discovery of fraud, then they have to
4 allege it with specificity who, when, what,
5 where. They didn't do it anywhere in the
6 complaint. They don't allege the specific facts.
7 The same thing is true with their suppression
8 claim.

9 THE COURT: In Frank's brief of
10 October 29, he says there are five basic claims

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11 alleged against UBS -- aided and abetted breaches
12 of fiduciary duty by HealthSouth D & O's, that
13 UBS owed a fiduciary duty and breached same, tort
14 of suppression, unjust enrichment and UBS
15 breached its contracts. Now, that's in the
16 brief.

17 MR. STARNES: And the motion to
18 dismiss, of course, is directed to the various
19 separate and several counts of the complaint.
20 There is a count, Count 11. I'm looking now at
21 the August 8 complaint to which the motion was
22 filed. There's a complaint in Count 11 for
23 intentional reckless and innocent
24 misrepresentation and suppression. That's Count
25 11.

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1 THE COURT: Is that specifically
2 against UBS?

3 MR. STARNES: It says defendants
4 including Director defendants, individual
5 defendants, fictitious defendants as well as E&Y
6 and UBS are liable to HealthSouth based upon
7 intentional reckless and/or innocent
8 misrepresentation and suppression of material
9 facts. I'm quoting from the complaint. That's a
10 fraud count.

11 THE COURT: All right.

12 MR. STARNES: Now, for that count to
13 stand under Rule 9, they have to say who, what,
14 when and where. What was the misrepresentation?

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15 what was the fact suppressed? They have to with
16 respect to the suppression plead with specificity
17 that details the relationship that gives rise to
18 the duty to speak.

19 THE COURT: Do you deny that you have
20 a fiduciary duty to HealthSouth?

21 MR. STARNES: Absolutely deny it.

22 THE COURT: Does the plaintiff
23 contend --

24 MR. SOMERVILLE: Yes.

25 MR. DIPRIMA: Yes, we contend.

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1 THE COURT: I want to hear on what
2 basis.

3 MR. DIPRIMA: We contend that we do
4 plead with specificity UBS attended Board
5 meetings. They had a special relationship.

6 THE COURT: I'm not really interested
7 in the minutia about the specifics of the
8 allegations. I want to hear about the fiduciary
9 duty claim.

10 MR. DIPRIMA: We plead that -- well,
11 do you mean separate and apart from the aiding
12 and abetting?

13 THE COURT: Right.

14 MR. DIPRIMA: Yes, we do plead that
15 because of the special relationship that UBS had
16 with --

17 THE COURT: What is the special
18 relationship? You've got an investment banker

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19 with a client.

20 MR. DIPRIMA: You have an investment
21 banker with a client, but with a very close tie
22 to the Board of Directors that attended Board
23 meetings. They advised the Board on a very close
24 basis. They had in their possession a lot of
25 intimate financial information about the company.

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1 THE COURT: Do you really think that's
2 a good claim?

3 MR. DIPRIMA: I think it's a good
4 claim, Your Honor.

5 MR. SOMERVILLE: Judge, we have
6 documents that were produced, a conference by UBS
7 talking about the special relationship that they
8 have enjoyed for years. We have those documents
9 where Scrushy is trying to exert pressure on UBS
10 to make special loans. We know from earlier that
11 UBS was involved in strategic planning of the
12 corporation in the Fall -- Summer and Fall of
13 2002 relating to going private and things like
14 that. We know from previously that Mr. Scrushy
15 had a special relationship with Ben Lauriello
16 that was an underlying factor at Med Partners and
17 at HealthSouth. This was not the routine
18 run-of-the-mill investment banking relationship.
19 We will be able to show that, we think, with the
20 discovery that we will get in this case. We have
21 some stuff already there.

22 MR. DIPRIMA: But what we pled is that
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23 they obtained secret information and attended
24 Board meetings. That's in paragraph 21.

25 THE COURT: Right. That's in the

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1 complaint.

2 MR. STARNES: That doesn't make you a
3 fiduciary.

4 THE COURT: I understand.

5 MR. DIPRIMA: Then paragraphs 83 to
6 90.

7 THE COURT: As a practical matter, is
8 that not an issue to really be decided at summary
9 judgment?

10 MR. STARNES: From what?

11 THE COURT: As a practical matter?

12 MR. STARNES: As a practical matter
13 what? I didn't hear the rest of it.

14 THE COURT: Is that really an issue to
15 be decided at summary judgment?

16 MR. STARNES: Well, I think -- No,
17 because of Rule 9. Rule 9 says, as a practical
18 matter, that allegations of fraud are to be dealt
19 with with specificity. All this business about
20 fiduciary, they agreed -- the plaintiff in this
21 case, HealthSouth, and UBS agreed UBS wasn't a
22 fiduciary. Yes, they had a long relationship,
23 but that doesn't make you a -- They may have
24 attended Board meetings. They said they did. I
25 don't know if they did or they didn't. That

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1 doesn't make you a fiduciary. There's no
2 allegation here sufficient to give rise to a
3 fiduciary relationship. With the suppression,
4 which is what they say the duty to speak arises
5 from the fiduciary relationship, with the
6 suppression count and with the innocent,
7 reckless, intentional misrepresentation count,
8 they have to comply with Rule 9. It's not an
9 option. They don't get a buy. Rule 9 says you
10 have to comply with it. They've made no effort
11 to comply with Rule 9 as to UBS, specifically the
12 who, what when and where of the fraud, the who,
13 what, where and when of the suppression. What
14 fact was suppressed and who suppressed it? They
15 have made no effort to comply with Rule 9 with
16 respect to either of those claims.

17 THE COURT: All right. What else,
18 Stan?

19 MR. STARNES: As Your Honor knows, it
20 appears from the face of the complaint that the
21 claim is barred by the statute of limitations and
22 the motion to dismiss on those claims is due to
23 be granted. Anything except for contract claims
24 are governed by a two-year statute. Any
25 complaint that's premised on acts or omissions

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1 prior to August 8, 2001 is barred by the statute.
2 That appears on the face of the complaint.

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3 That's important, now, because of the effect it
4 has on discovery and other things. They have not
5 alleged anything that would get them around that
6 bar, the two-year bar, August 8, 2001. The only
7 thing they seek to do is they raise this
8 fiduciary relationship again, which there's no
9 basis for in the allegation. The only cases that
10 have set a fiduciary relationship withhold the
11 statute involving defendants who are active in
12 the day-to-day management --

13 THE COURT: The recent eBay case down
14 in New Jersey, as I read it, recognizes the tort
15 against a third party for conspiring or aiding
16 and abetting Officers and Directors to breach
17 their fiduciary duty. Is that the first Delaware
18 case that reaches that conclusion?

19 MR. DIPRIMA: I don't know, Your
20 Honor. It's just a recent one, and I wanted to
21 give Your Honor the benefit of seeing it.

22 THE COURT: All right.

23 MR. DIPRIMA: I don't believe so. I
24 think there are earlier ones similar, but it's
25 the minority rule.

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1 MR. STARNES: It's never been adopted
2 in Alabama. It is the minority rule. But more
3 importantly --

4 THE COURT: Was that a decision of the
5 Delaware Supreme Court, wasn't it?

6 MR. SIMPSON: Yes, I'm saying Delaware

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is with the minority. Most states --

8 MR. STARNES: It's the Chancery Court
9 in Delaware.

10 THE COURT: It is. I'm sorry.

11 MR. STARNES: But that case, even if
12 you assume the law here, this complaint doesn't
13 allege anything other than the provision of
14 investment banking and tries to give those
15 services an evil cast.

16 THE COURT: It makes a blanket
17 allegation they engaged in activities to suppress
18 and conceal and all that.

19 MR. STARNES: Exactly.

20 THE COURT: The usual and standard
21 stuff.

22 MR. STARNES: Right. None of which
23 applies to Rule 9, so the motion is due to be
24 granted on that basis. They can't get around the
25 statute of limitations by claiming fraud because

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1 they haven't alleged what the fraud was that kept
2 them from filing a lawsuit insofar as UBS is
3 concerned, assuming that it did. So the motion
4 to dismiss as to any claims predating August 8,
5 2001 is due to be granted. That's apparent from
6 the face of the complaint.

7 A couple of other things, Your Honor,
8 about, first of all, their aiding and abetting
9 claim. They didn't allege participation in that.
10 They allege investment banking services, but they

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11 don't allege participation with specificity and
12 the requisite particularity. They don't allege
13 fraud. They don't allege what the breach of the
14 fiduciary duty was by UBS. They don't even
15 allege facts sufficient to concluded that the
16 fiduciary duty existed, so that's due to be
17 dismissed. As you know, a civil conspiracy claim
18 in Alabama can only stand if there's an
19 underlying tort. There's no underlying tort here
20 to support a civil conspiracy claim. The other
21 thing --

22 THE COURT: Isn't there a public
23 policy issue there, Mr. DiPrima?

24 MR. DIPRIMA: As far as civil
25 conspiracy?

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1 THE COURT: Yes. Well, I'm speaking
2 in terms of it being a tort to engage in a
3 conspiracy or activities to cause D and O's or
4 the Corporation to breach their fiduciary duty
5 when there's no other underlying tort against the
6 parties so engaged in the conspiracy.

7 MR. DIPRIMA: The underlying tort is
8 the breach of fiduciary duty, which is by the
9 Director fiduciaries.

10 THE COURT: Isn't that a public policy
11 issue of Alabama law?

12 MR. DIPRIMA: It's an issue of
13 Delaware law because the tort --

14 THE COURT: Delaware law recognizes

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15 the tort. I agree with you about that. But
16 isn't it a public policy issue in Alabama as to
17 whether Alabama should likewise recognize the
18 Delaware decision?

19 MR. DIPRIMA: Do you mean as a
20 judicial matter?

21 THE COURT: As a matter of public
22 policy, is it contrary to Alabama law?

23 MR. DIPRIMA: I think Alabama should
24 recognize that there's an interest in people
25 doing business in Alabama not aiding and abetting

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1 fiduciaries, Directors and Officers in another
2 American jurisdiction to breach their fiduciary
3 duty. I certainly think that. But it is -- the
4 tort is a creature of Delaware law, aiding and
5 abetting the breach of a fiduciary duty by an
6 Officer or Director of a Delaware corporation.

7 Now, civil conspiracy is a virtual
8 synonym, and I think we've demonstrated twice in
9 this brief and always when we were arguing about
10 something similar in the Capstone and Source
11 round of dismissal arguments. I want to address
12 a few of the things that Mr. Starnes touched on.
13 He said we didn't comply with Rule 9, that we
14 didn't plead who, what, when and where. Maybe
15 we're reading different complaints.

16 THE COURT: You allege between 1998
17 and 2002 all these activities occurred.

18 MR. DIPRIMA: Exactly.

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19 THE COURT: I understand that.

20 MR. DIPRIMA: We allege specifically
21 who. Capek, the top analyst over at UBS, giving
22 strong buy recommendations. We allege the
23 specific emails where he told his friends, other
24 investment bankers and just friends that
25 HealthSouth was a mess and he would not own a

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1 share. This is when he's telling the public
2 strong buy. We allege that that strong buy
3 recommendation remained until August 2002 when
4 the first scandal broke, the one involving the
5 Medicare rules. Then he changed it from strong
6 buy to buy. We certainly allege that. We
7 alleged who, what. When, we alleged as '99 to
8 2002. Where, Capek was sitting in New York and
9 HealthSouth was sitting in Alabama. I can't --

10 Again, Mr. Starnes criticized me for
11 using the first person and I won't do that
12 anymore. But one cannot objectively look at this
13 complaint and say it fails the specificity test
14 even as to fraud. And these are not allegations
15 of fraud but, even if they were, this complaint
16 is plenty specific. Now, under a case that Mr.
17 Starnes cited and sent the Court just in this
18 latest round on October 29th, Bethel v. Thorn,
19 Alabama Supreme Court, he sent to the Court
20 regarding fraudulent suppression.

21 THE COURT: Right.

22 MR. DIPRIMA: But it goes into the

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pleading requirements under Rule 9 as well.

24 THE COURT: Right.

25 MR. DIPRIMA: And it quotes the

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1 committee regarding Rule 9-B, "The special
2 requirement as to fraud," it says -- and this is
3 a quote -- "does not require every element in
4 such actions to be stated with particularity. It
5 simply commands the pleader to use more than
6 generalized or conclusory statements to set out
7 the fraud complained of before you must show the
8 time, place and contents and substance of the
9 false representations." I maintain, Your Honor,
10 respectfully, that this complaint more than
11 satisfied that. As to UBS's knowledge, we
12 specifically allege that UBS knew that the
13 financials were materially overstating the
14 financial condition of the company.

15 As to aiding and abetting, as far as
16 specificity, there's plenty of specificity about
17 the underlying tort, the underlying tort with
18 Scrushy and the others cooking the books.
19 There's plenty of specificity here. Civil
20 conspiracy, as they pointed out, is a virtual
21 synonym to aiding and abetting. And as far as
22 the statute of limitations is concerned, there
23 are a couple or really three different reasons,
24 not just one, why this complaint and no part of
25 it is due to be dismissed as against UBS. First

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1 of all, where the tort is concealed, the statute
2 of limitations does not begin to run. We cited
3 cases to that effect. Mr. Somerville did in his
4 earlier brief and we did on this one.

5 THE COURT: You've got six months to
6 file it after you knew or should have known about
7 it.

8 MR. DIPRIMA: Yes, sir. And in this
9 case, since the underlying tort involved false
10 accounting, well, by its very nature that's
11 concealed.

12 THE COURT: You're saying you beat the
13 March 2003 deadline.

14 MR. DIPRIMA: We made the March 2003
15 deadline. We pled the false accounting in
16 paragraphs 29 through 48 of the complaint with
17 great specificity. We pled that UBS knew the
18 accounting was overstated at paragraph 87. We
19 pled that UBS continued a strong buy through
20 August of 2002 and then changed that to a buy.
21 Without the word "strong," buy still doesn't mean
22 sell. We pled a scheme to cover up the material
23 misstatements continuing until March of 2003. So
24 on that basis alone of concealment -- and that
25 relates to any tort, not just fraud -- the

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1 statute didn't begin to run.

2 Second, the statute of limitations
3 does not run on a fiduciary breach as long as the

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4 fiduciary remains a fiduciary.

5 THE COURT: But if, in fact, UBS is
6 not a fiduciary, that wouldn't be applicable to
7 UBS, would it?

8 MR. DIPRIMA: I believe it would, Your
9 Honor, for the following reason. For a tort like
10 a conspiracy to breach somebody else's fiduciary
11 duty, the applicable statute of limitations is
12 the statute of limitations for the underlying
13 tort. And that one doesn't run until the
14 fiduciaries stop being fiduciaries.

15 THE COURT: That's true as to the
16 D and O's.

17 MR. DIPRIMA: Yes, sir.

18 THE COURT: You're saying it is also
19 true against someone who may be a fiduciary in a
20 fiduciary relationship, but is engaging in a tort
21 with the fiduciary. Is that what you're telling
22 me?

23 MR. DIPRIMA: Yes, sir, exactly. And
24 third, a case that was cited by Mr. Somerville in
25 his earlier, brief Holloway v. Winechick at 690

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1 So.2nd 429, contains the following. This is
2 really a separate reason. The question of when a
3 party discovered or should have discovered the
4 fraud which were told the statute of
5 limitations --

6 THE COURT: That's a question for the
7 jury.

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8 MR. DIPRIMA: It's for the jury. A
9 dismissal based on the statute of limitations is
10 proper only if, from the face of the complaint,
11 it is apparent that the tolling provisions do not
12 apply. Based on this complaint, that test cannot
13 begin to be met.

14 THE COURT: All right. Are there any
15 other substantive matters y'all want to talk
16 about?

17 MR. STARNES: Just this. Consider
18 this so-called fraud claim in the context of what
19 it is. He's not here representing the purchaser
20 of a security or a seller of a security. He's
21 here representing HealthSouth. And with respect
22 to his fraud claim, assuming somebody at UBS said
23 "buy" publicly when they said "sell" privately,
24 how is that a misrepresentation as to
25 HealthSouth? Where is that a fraud? I mean, you

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1 throw all this up against the wall, but you've
2 got to give --

3 THE COURT: Some very nice legal
4 issues involved.

5 MR. STARNES: But not here. There's
6 not one here. It is fundamental Alabama law that
7 to allege fraud, you've got to say what fact was
8 misrepresented. What do they say that UBS
9 misrepresented to HealthSouth? Where is that
10 allegation in this complaint?

11 THE COURT: All right, gentlemen. I
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12 appreciate your arguments to me this afternoon.
13 Henry and Frank's other partner have already
14 submitted to me their proposed order with regard
15 to the issue of arbitration, and they do not
16 choose to submit any additional proposed order,
17 as I understand it. So then, we will have a
18 proposed order from Mr. Starnes on behalf of UBS
19 and from the plaintiff on behalf of the
20 plaintiffs with regard to the UBS issue. Am I
21 leaving out anything?

22 (No response.)

23 THE COURT: The last thing we've got
24 are the D and O's, and we're scheduled --

25 MR. HALEY: I think this is it.

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1 MR. SOMERVILLE: December 20th, Your
2 Honor. The Directors and the derivative claims
3 against the Directors.

4 THE COURT: Okay. Has anybody new
5 pled or been sentenced?

6 MR. SOMERVILLE: No, sir.

7 THE COURT: Ms. Stephanie, you give me
8 a copy of the transcript and charge it to whoever
9 you've been charging it to.

10 MR. SOMERVILLE: Judge, I have a copy
11 of the transcript from the morning of July 26th,
12 if you want a copy of that.

13 THE COURT: I've got both transcripts,
14 morning and afternoon.

15 MR. STARNES: We will get you an order
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16 in a week. Is that all right?

17 THE COURT: That will be fine. That
18 will be next wednesday.

19 MR. STARNES: We'll exchange orders
20 next wednesday.

21 THE COURT: That'll be fine with me.
22 whatever is convenient with y'all.

23 MR. SOMERVILLE: That's perfect.

24 MR. HALEY: Denied would be
25 satisfactory with us.

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1 THE COURT: All right, gentlemen.
2 Have a good afternoon.

3 (In recess at 3:20 p.m.)

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1 C E R T I F I C A T E
2 STATE OF ALABAMA)
3 JEFFERSON COUNTY)
4 I hereby certify that the above and
5 foregoing hearing was taken down by me in
6 stenotype and transcribed by means of
7 computer-aided transcription, and that the
8 foregoing represents a true and correct
9 transcript of said hearing.
10 I further certify that I am neither of
11 counsel, nor of kin to the parties to the action,
12 nor am I in anywise interested in the result of
13 said cause.

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Stephanie Burton
Notary Public

19 My commission expires 9/20/2006

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